

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
PETITION FOR
REHEARING**

76-1355

NO. 76-1355

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

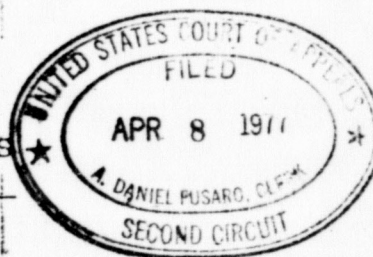
-v-

RICHARD JOSEPH TODARO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

PETITION BY THE UNITED STATES
OF AMERICA FOR REHEARING



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UNITED STATES COURT OF APPEALS

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Docket No. 76-1355

UNITED STATES OF AMERICA,

Appellee,

-v-

RICHARD JOSEPH TODARO,

Defendant-Appellant.

PETITION BY THE UNITED STATES
OF AMERICA FOR REHEARING

Preliminary Statement

The United States of America respectfully petitions for rehearing of the decision of this Court (Moore, Feinberg and Gurfein, C.J.J.) decided February 24, 1977, reversing, in part, the conviction of Richard Joseph Todaro on the charge of violating the federal gambling statute (18 U.S.C. § 1955).

REASONS FOR THIS PETITION

In reversing the conviction of the Defendant Todaro, this Court has seriously undermined its position stated in United States v. Becker (461 F.2d 232), which held that independent contractors come within the scope of the statutory prohibition against conducting an illegal gambling business (18 U.S.C. Section 1955). The Government urges this Court to reexamine the record in the belief that -- despite what was substantial perjury and evasion by the immunized Castellanis and the disappearance during trial of the key accomplice witness, Richard Giglia -- there is ample evidence in the record to support the conclusion that Todaro was a paid independent contractor whose services were absolutely essential to the sports booking facet of the operation. The trial jury, which apparently concluded that Todaro was an independent contractor, had the benefit of the negative demeanor evidence of the two accomplice witnesses who endeavored to exculpate him. Even without this, however, a trace of the atmosphere of intimidation and collusion which pervaded the trial can be gleaned from a careful examination of the transcript. More importantly, however, even without the testimony of Richard Giglia (which in the grand jury was that Todaro had exclusively provided their operation with sports line information for one and a half years on a salary basis), there is

sufficient non-accomplice testimony in the record to support the jury's determination of guilt. This conviction has been overturned because of the perjury of the Castellanis. A meticulous examination of the wiretap evidence and the expert's testimony not only proves that perjury, but demonstrates beyond any doubt that Todaro was an independent contractor, providing an essential service.

I. FACTS

In early 1972 the F.B.I. conducted physical and electronic surveillances of a sports and horse bookmaking operation in the Buffalo area which was being conducted by Steve and Anthony Castellani, Richard and Sam Giglia, John Zak and others. The operation consisted of two walk-in "books", the Riverside and Kenmore News Stands, and two apartment telephone "books" whose locations were changed periodically. Todaro was seen at the Kenmore News Stand on several occasions during the course of the physical surveillances and his voice was intercepted supplying sports "line" information to the organization.

The record reflects that, on September 8, 1972, the original suspects pleaded guilty to an information charging

them with the use of interstate facilities to transmit wagering information (18 U.S.C. §1084). On November 17, 1972 all were fined and placed on probation, except Zak who was given probation only.

It may be gleaned from the record that following the sentencing, the two Castellanis and Richard Giglia were granted immunity and ordered to testify before the Grand Jury. Their testimony given on January 30, 1973, together with the original surveillance evidence, formed the basis of the February 6, 1973 indictment of Todaro.

At the trial the conspiracy count was directed out and the jury found Todaro guilty of the substantive charges of violating 18 U.S.C. §1955 and 18 U.S.C. §2232. During the course of the trial the Government's principal witness, Richard Giglia, failed to appear when called and a warrant was issued for his arrest. Todaro was sentenced to three years incarceration on the substantive count of gambling and given a one year concurrent sentence on the destruction of evidence count.

II. THE OPINION

This Court's Opinion of February 24, 1977 indicates that the Section 1955 gambling charge was reversed for failure of

the Government's proof. More specifically, the Court found that Todaro's conduct -- supplying sports "line" information -- did not fall within the broad guidelines set by the Court in United States v. Becker, 461 F.2d 232. Parenthetically, the Opinion seemed to reflect that the Court was troubled by what may have appeared to have been an unnecessary delay prior to indictment, unnecessary delay between indictment and trial, and a disparity in sentencing which was unfair to Todaro.

III. FAILURE OF PROOF

On page 1971 of its Opinion the Court said,

"There was no proof Todaro placed bets, received bets, acted as a runner, was an employee of the Castellanis or participated in the operation of their business." Even mindful of the breath we gave this Congressional intent in United States v. Becker, 461 F.2d 230 (1972), cert. denied, 420 U.S. 776 (1974), there was no proof adequate to place Todaro in any of the mentioned categories."

At the bottom of page 1971, footnote 5 indicates that the statute also encompasses independent contractors regardless of how minor their roles and that the statute excludes only customers.

It has been the Government's position that Todaro was an independent contractor within the meaning of Becker. The

proof in support of that -- even without the important evidence of the missing Richard Giglia -- was quite substantial:

1. Forty conversations were taken from the electronic surveillance. These showed that a single "voice" called in the sports "line" on 9 out of 12 days of the electronic surveillance and that this sports "line", and only this sports "line", was later disseminated to the customers of the gambling business with only occasional minor modification caused by the subsequent wagering activity. The jury called for pencils and pads, obviously to compare Todaro's "line" against the "line" disseminated (A 918). The jury convicted, implicitly rejecting Steve Castellani's contrived assertion that he formulated his own "line".

2. A stipulation (A 130)* established that the "voice" calling in the sports "line" was that of Richard Todaro.

3. Even the hostile and evasive testimony of the immunized Castellanis established that they owned and conducted a sports and horse bookmaking operation, that there were more than five persons involved in the operation, that it was in substantially continuous operation for a number of years and that it did a

*A refers to page in the Appendix on Appeal.

gross business in excess of \$2,000 or more on any one day. The reluctance of Steve and Anthony Castellani to incriminate Todaro was conspicuous. Indeed Steve Castellani persistently denied that Todaro was paid for furnishing the sports "line" until he was confronted with his own Grand Jury testimony to the contrary (A 472-476). When questioned as to who paid Todaro for the sports "line", Steve Castellani conveniently said that it was the missing Richard Giglia (A 472-475). Indeed, his testimony throughout the trial palpably reeks of a conscious determination to shield Todaro and withhold the truth. (A 447-457, 468-470, and 477-488)

4. The testimony of William Holmes, an F.B.I. gambling expert, established the nature and volume of the business. But, most importantly, it established that Todaro's line was a professional "bookies' line" (not an ordinary sportsman's handicap) which was essential to the gambling business. The electronic surveillance tapes established that on the three days when Todaro failed to call in the "bookies' line", the Castellanis refused to accept bets on sporting events. On the other nine days when Todaro furnished the sports "line", the Castellanis disseminated that line and accepted sports bets only in accordance with it.

The District Court instructed the jury as to each element of the offense, including the law regarding the degree of participation necessary to constitute "conducting". The jury returned a verdict of guilty. In so doing, the jury clearly determined that Steve Castellani was not believable when he testified that he used his own "line" in the operation. The electronic surveillance evidence and the testimony of the expert, Holmes, supports the jury's determination most strongly. The proof amply demonstrated that Todaro alone provided the sports "line" to the gambling operation, that it was the only "line" the Castellanis trusted, and that without Todaro's sports "line" they refused to conduct the sports bookmaking.

It is therefore submitted that the proof demonstrated that Todaro was an "independent contractor" within the meaning of Becker and that his services were a vital and necessary part of the Castellani gambling operation. Therefore, Todaro's conviction should stand.

IV. DELAY PRIOR TO INDICTMENT

A careful reading of the first two paragraphs on page 1969 of the Court's Opinion indicates that the Court was troubled by the circumstances leading to Todaro's indictment. The facts which can be gleaned from the record indicate, however, that

the Government acted quite properly and expeditiously in moving against Todaro. The original principals pleaded guilty on September 8, 1972 and were sentenced on November 17, 1972. Following the sentencing, the Castellanis and Richard Giglia were immunized by court order (with the approval of the Attorney General,) and they testified in the Grand Jury on January 30, 1973. Todaro was indicted on the basis of the testimony of Richard Giglia, and the electronic surveillance on February 6, 1973.

Hence, the events as they unfolded controlled the Government's procedure, which was in all respects proper, necessary and fair.

V. PRETRIAL DELAY

Paragraph 3 of page 1969 of the Court's Opinion observes that:

"More than three years later, Todaro was put on trial (April 20, 1976). The record is devoid of any explanation for this hiatus."

The Government is puzzled by this statement because with the exception of two brief delays requested by the Government (one for two weeks because the prosecutor was on trial, and one for three weeks to allow a foreign witness to appear in

January rather than late December), all delays in this case were chargeable to either the defense or the District Court for its deliberations. A review of the one hundred and four entries in the six-page docket sheet (1a-6a) together with a review of the sixty-two exhibits bearing upon the extensive pretrial litigation in this case, demonstrates that the case was in almost constant litigation from indictment to trial. The issue of delay was not raised by the Defense to the Government's knowledge; and, indeed, could not be successfully maintained since the Government's conduct in this regard was meticulous.

VI. SENTENCING

The Court also appeared to be troubled by the disparity between Todaro's sentence and those of the defendants in the "Castellani" case. It is apparent from the record that Todaro did not choose to plead guilty as the Castellanis had done. But of more importance is the fact that this Court did not have before it the Government's information demonstrating (through multiple affidavits and some fifty pages of investigative material) a protracted and vicious course of organized criminal activity which was submitted to the District Court. This Court had before it only the sentencing

information urged by the Defendant (A 68a). The District Court had a duty to fashion a sentence which not only fit the crime, but also fits the criminal. See: United States v. Foss, 501 F.2d 522, 527-528 (1st Cir. 1974). The extensive materials presented to the District Court by the Government have not been included in the record; but, in the event that the conviction is reinstated, the Government believes that it can satisfy this Court that the District Court's sentence was entirely appropriate.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Court should reexamine its findings as to the failure of proof. It is further submitted that the Government's handling of this case was in every respect proper and that the sentence is appropriate to the violation.

Respectfully submitted,

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